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Supreme Court of the United States

October Term, 1978

No. 78-601

ROBERT K. SCHULTZE and EDITH GEORGIANNA SCHULTZE, his wife,

Petitioners,

vs.

CHEVRON OIL CO., a California Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATUTES AND RULES

NONE .....

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert K. Schultze and Edith Georgianna Schultze, (hereinafter collectively referred to as Schultze) pray that a writ of certiorari issue to review the judgment entered on June 12, 1978 by the United States Court of Appeals for the Third Circuit in *Robert K. Schultze and Edith Georgianna Schultze v. Chevron Oil Co., a California Corporation, No. 77-1152.*

OPINIONS

The opinions of the Court of Appeals and the District Court are both unreported. Appendix A to this petition is a copy of the opinions of the Court of Appeals; Appendix B is the judgment of that court. Appendix D is a copy of the District Court's opinion, reflected in the trial minutes only.

JURISDICTION

This Court has jurisdiction under 28 U.S.C.A. Sec. 1254(1). The Court of Appeals rendered its opinion on June 12, 1978. A timely petition for rehearing was denied on July 17, 1978 (Appendix C). The Court of Appeals had jurisdiction under U.S.C.A. Sec. 1291 and 1294(1) of the appeals from the District Court for the District of New Jersey. The District Court had jurisdiction of the complaint under 28 U.S.C.A. Sec. 1331(a) and 1332(a).

QUESTIONS PRESENTED

1. Contrary to a generation of established law in New Jersey, that no contractual right is an absolute privilege, unencumbered by an obligation to act fairly and in good faith, the court below held that respondent oil company was not obligated to furnish Schultze with a written waiver of its right of first refusal to purchase Schultze's realty although it had no interest in buying it, and Chevron knew that the lack of such written waiver prevented Schultze from even negotiating with others, and Schultze's medical necessity to permanently move to Florida. It further held that respondent had the absolute right to do nothing until Schultze presented it with a bona fide offer of purchase in writing, even though Schultze was unable to secure the same because of the very existence of the right of first refusal.

(a) Does not this absolute right approved by the majority opinion contravene the established doctrine of New Jersey law that every contract contains an implied covenant of good faith and fair dealing?

2. The majority held below that only a *bona fide* offer to purchase could be the sole viable evidence of a reasonable probability of sale of realty. This would appear to mean that any offer had to be in writing, since the majority also speaks of Chevron merely awaiting written notice of an acceptable bona fide offer.

(a) Is this reasoning not completely oblivious to Chevron's disinterest in buying which renders the validity of the right of first refusal nugatory? Does not this reasoning overlook the fact that any realty has a market value, particularly when the respondent's own appraiser valued the parcel at $148,000.00? Does not this reasoning efface from the record an uncontradicted oral offer of $150,000.00 by Wright Hitt?

3. Which of the two conflicting opinions should be enunciated by this Court to be the law of the land, that expressed by the Fifth Circuit in *Frank H. Coulsen Inc. Buick v. General Motors Corp.*, 488 F 2nd 202 (1974) that there is no absolute right unencumbered by an obligation to act fairly and in good faith, or the doctrine of absolute right enunciated in the majority opinion below?

NO STATUTE IS INVOLVED HEREIN

STATEMENT OF THE CASE

In 1974 Schultze sued respondent for damages arising out of the latter's failure to act fairly and in good faith in not giving Schultze a written waiver of its right of first refusal to purchase the Schultze property, and thereby depriving Schultze of even the opportunity to negotiate a sale to others. (App. E) Chevron's position was that it had a right to do nothing so long as Schultze did not furnish it with a written *bona fide* offer from others.

Before describing the proceedings in the two courts, we summarize the facts. The trial court's findings (App. D) were affirmed on appeal (App. A), with a fourteen page dissent. The following statement of facts is therefore taken from the record opinion by the trial court and the majority and dissenting opinions of the Court of Appeals (all cited to the pages of the appendix).

FACTS

In the fall of 1970, the Schultze family physician informed them that the demands of health required Mrs. Schultze and one of their daughters to move to a warmer climate. Faced with this warning, Schultze offered to sell the business to Chevron so that they could relocate in Florida. Chevron had a right of first refusal to purchase, and had to exercise that right within thirty days after Schultze had submitted to it a written notice of a bona fide offer from a third party. (App. A, page 9a, Note 1) Chevron declined this offer, and Schultze requested a written waiver after the existence of the right of first refusal impeded negotiations with third parties. (App. A, Pages 9a and 10a) The continued refusal to give a written waiver deterred at least three purchasers who had contemplated offers of between $120,000.00 and $168,000.00 from negotiating for such purchase. (App. A, page 10a) After Chevron had finally given the written waiver, Schultze was forced to sell for $85,000.00, Chevron's own appraiser having valued the property at $148,000.00. (App. A, Page 10a)

Concededly Schultze never literally complied with Paragraph 11 of the lease, because a *bona fide* offer by a third party was never communicated to Chevron in writing.

A. THIS SUIT-PROCEEDINGS IN THE TRIAL COURT.

The trial court held that Chevron had no obligation to waive its right of first refusal where Schultze had failed to submit a *written bona fide* offer; that there was no evidence suggesting a reasonable probability that Schultze would have sold their station to a third party if a written waiver had been given, and that even if Schultze's ability

to sell was impaired by absence of the written waiver, there was no evidence upon which the jury could have awarded damages. (App. D, page 23a).

B. THIS SUIT—PROCEEDINGS IN THE COURT OF APPEALS

The majority opinion affirmed the judgment of dismissal *in advance of jury submission,* and held that Schultze never met the requirements of Clause 11 in that no acceptable bona fide offer was received by Schultze, with no written communication thereof to Chevron, and that there was no question for the jury because no copy of an oral offer can be submitted in writing. (App. A, pages 4a, 8a). They further held that the record did not contain any evidence of a reasonable probability of effecting a sale, because there was no evidence of a bona fide offer, with mere expressions of interest being insufficient to support the requirement of reasonable probability. (App. A, page 8a) (App. D, page 23a). The dissenting opinion, fourteen pages long, posed the crux of the issue to be whether as a matter of law Chevron acted fairly and in good faith when upon request it did not waive its right of first refusal for two years, after it did not desire to purchase, knew such clause unwaived in writing impeded negotiations with others, and knew of Schultze's necessity to sell in order to permanently remove to Florida for reasons of health. (App. A, page 18a) The dissent concluded that it could *not* so be held as a matter of law. (App. A, page 19a) The opinion further characterized the premise of the majority as a "causal dismissal of a prominent feature of New Jersey's judicial landscape," and stated that a Judge "is not free to slight a doctrine simply because its application is difficult." (App. A, page 15a, note 23)

REASONS FOR GRANTING THE WRIT

The cyclone of good faith and fair dealing sweeping the law of this country, leaving dead in its wake the centuries old sanctity of unambiguous contractual provisions, is before this Court de novo. Added to first impression is a direct conflict between the *Third Circuit* and the *Fifth Circuit* on this issue. The *Fifth Circuit* faced the problem in *Frank H. Coulsen Buick v. General Motors Corp., (supra),* where General Motors had by freely negotiated agreement the right to limit the price at which the auto dealer (Coulsen) could sell its franchise. General Motors Corp. insisted on a lower price than Coulsen could obtain, in the interests of protecting the franchise. The trial court submitted the issue of breach of good faith and fair dealing to the jury, and after a verdict in Coulsen's favor, set it aside and dismissed the complaint on the ground that General Motors' right was an absolute privilege. The Fifth Circuit reversed and reinstated the jury verdict, holding that the issue of fair dealing and good faith as to General Motors' alleged overreaching was present and therefore a question of fact was for the jury.

In the case at bar, we assume, arguendo, the validity of the right of first refusal clause, thus dispensing with the controversy in the majority and dissenting opinions over interpretation of *Shell Oil Co. v. Marinello,* 63 N.J. 402 (1973), 351 A. 2nd at 352. Chevron's right of first refusal cannot be considered in any fashion as being privileged when Chevron did not desire to purchase at any price, let alone a price equal to that of another offeror. As the dissent points out, the right to buy does not give Chevron the right to impede Schultze's right to sell to others (App. A, Page 17a).

The oral argument advanced by respondent that Chevron could retain its first refusal rights as a matter of law to meet a bargain price offer after it did not wish to

buy at all, clearly offends the doctrine of good faith and fair dealing to the point of no return, and results in inequity and injustice.

We respectfully submit the dissent correctly sets forth the law of New Jersey. That state has added to the cases cited, another, as yet unreported, *McDonald v. Mianecki,* decided April 13, 1978, New Jersey Superior Court, Appellate Division, wherein a covenant of habitability has been inserted into a deed of conveyance of a new house, bottomed upon the same doctrine of good faith and fair dealing.

Perhaps the pithiest reasoning of the very clear law applicable to the instant case is set forth in the dissent (App. A, page 15a, note 23) as follows:

> "The majority acknowledges the existence of the covenant of good faith in New Jersey contracts, but avoids that precept with the comment that 'Such a broad principle, however, is of little assistance in the present factual situation.' Majority opinion at 5.
>
> "This casual dismissal of a prominent feature of New Jersey's judicial landscape seems at odds with the role of a judge in the application of common law. Common law evolves through the interaction of abstract doctrine and palpable fact in the context of individual disputes. The judge must trace upon the circumstances of the specific case the projection of doctrinal developments. And conversely the court's task is to measure emerging legal precepts against the demands of practicality and conscience in particular factual matrices. But he is not free to slight a doctrine simply because its application is difficult."

The dissent concluded as follows:

> "Accordingly, I believe that the case should not have been taken from the jury, and the trial judge's action in so doing requires reversal of the judgment." (App. A, page 19a)

We are not unmindful of the tremendous burden on this Court, and recognize that there are many important cases to be decided by this Court. We respectfully suggest, however, that this case is vital to Schultze, who were straitened financially, physically and mentally by the callous indifference of Chevron to their plight, and that due process, defined as a fundamental sense of decency by the late Mr. Justice Felix Frankfurter, is truly involved herein. To permit this judgment of dismissal to stand will be to grant the oil industry a green light to further wield with impunity its economic power against the individual and the small business man. Finally, a decision by this Court on this issue of first impression before it will serve to alert all the courts below of the implications of this long over due doctrine of fair dealing and good faith, and prevent a repetition of the injustice that occurred in the case at bar.

CONCLUSION

There is a striking inconsistency in the majority opinion at one point. The assertion that a right of first refusal does not place a burden upon the grantor thereof (App. A, page 7a). EVEN THOUGH THE RECORD FLATLY BELIES SUCH ASSERTION. At another point, the majority opinion recognizes such burden by stating that "Chevron's right of first refusal apparently impeded negotiations with the interested parties." (App. A, page 3a).

We respectfully submit that under all of the circumstances set forth in this petition that a Writ of Certiorari should issue, and that the majority decision below be reversed in accordance with the dissenting opinion.

Dated: September 25, 1978

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APPENDIX A—Court of Appeals Opinion

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1152

ROBERT K. SCHULTZE and EDITH GEORGIANNA SCHULTZE, his wife,

Appellants

v.

CHEVRON OIL CO., a California Corporation

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 74-132)

Argued April 24, 1978

Before: ALDISERT and ADAMS, *Circuit Judges,* and HANNUM, *District Judge.**

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* Honorable John B. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

(Filed June 12, 1978)

ALDISERT, *Circuit Judge.*

The major questions presented in this appeal by plaintiffs from a directed verdict in favor of the defendant in a diversity case require us to decide whether the district court erred in determinations relating to a right of first refusal clause in a lease between appellants, Robert and Edith Schultze, owners of a service station, and Chevron Oil Co. Appellants contend here, as they did in the district court, that Chevron, in refusing either to exercise or waive its right of first refusal, tortiously interfered with their attempts to sell the premises. They also argue that New Jersey law implies a covenant of fair dealing into every contract, and that Chevron violated its duty to deal in good faith. We believe that the district court properly directed a verdict in Chevron's favor and, accordingly, affirm.[1]

I.

The record discloses the following facts, none of which is seriously in dispute. Robert and Edith Schultze owned real estate on which a service station was erected. In 1963, they entered into a commercial arrangement with Morris Oil Company, Inc., containing these material terms; the Schultzes leased the property to Morris; Morris sublet the station back to the Schultzes; the Schultzes operated the station, purchasing supplies and inventory from Morris; and Morris was granted a "prior right to purchase" in the event the Schultzes received an offer to purchase during the 15-year term of their lease. On June 30, 1968, Morris assigned to the appellee, Chevron, all Morris' rights and duties under the agreement, including the prior right to purchase.

1. Our disposition precludes consideration of the appellants' additional contention that compensatory and exemplary damages are appropriate.

In late 1970, when the Schultzes decided to sell their business, Robert Schultze inquired of a Chevron sales representative whether Chevron would be interested in purchasing the station. After consulting with corporate officials, the sales representative informed Schultze that Chevron had no interest in making the purchase.

Schultze then advertised the property for sale and listed it with real estate brokers. As a result, several prospective buyers expressed interest in the property. Chevron's right of first refusal apparently impeded negotiations with the interested parties. Schultze therefore sought Chevron's written waiver of its right of first refusal; Chevron did not execute a written waiver, but in February 1972, after informing Schultze again that it would not buy the station, suggested the alternative of drafting a new long-term lease. Negotiations between Schultze and Chevron continued for six months before Chevron decided not to enter a new lease but to waive, in writing, its right of first refusal.

After receiving the waiver, the Schultzes sold the station for $85,000. They brought this action to recover the difference between the sale price and the highest "offer" received before Chevron's waiver of its prior right to purchase; to recover damages for injuries to their health, for pain and suffering and for mental anguish caused by Chevron's acts; and to collect exemplary damages for Chevron's actions.

In orally granting Chevron's motion for a directed verdict, the district judge concluded that Chevron had no obligation to waive its right of first refusal where the Schultzes failed to submit a written bona fide offer; that there was no evidence suggesting a reasonable probability that the Schultzes would have sold their station to a third party if Chevron had waived its right; and that, even if Chevron did impair the Schultzes' ability to obtain firm offers, there was no evidence upon which the jury could have awarded damages. The parties agree that the law of New Jersey controls this diversity case.

II.

Chevron's prior right to purchase, contained in Clause 11 of the parties' lease, provides in pertinent part:

> If Lessors receive from a third party an acceptable bona fide offer to buy such property, Lessors shall forthwith give Lessee written notice thereof together with a copy of such offer. Lessee or its nominee shall have 30 days from the receipt of such notice and offer to buy such property at the terms of such offer relating to such property. If Lessee or its nominee fails to exercise this option, Lessors may, within 90 days after receipt of such written notice by Lessee, sell such property but only for a price and upon terms of payment and upon other terms which are identical to those set forth in the notice to Lessee.

A.

The primary requirements of this provision are unambiguous. In order to create any duty on Chevron's part, two conditions must have been met. The Schultzes must have received "an acceptable bona fide offer", and the offer must have been communicated to Chevron in writing. Neither condition was met.

Because there was no evidence that any of the parties interested in purchasing the property ever made an offer of sufficient specificity to fulfill the bona fide offer requirement, the district judge did not err in deciding as a matter of law that no bona fide offer was received by the Schultzes. More important, even if evidence had existed on this question which would have implicated the fact-finding role of the jury, the jury's consideration of the question was foreclosed by the fact that no written notice of such an offer was given to Chevron. We fail to see how a "copy" of an oral offer can be submitted in writing.

B.

Apparently recognizing that the express terms of the quoted provision were unfulfilled by them, appellants argue that, in any event, Chevron violated its duty of fair dealing by not executing a written waiver of its prior right to purchase. They correctly state that New Jersey courts recognize the principle that

> [i]n every contract there is an implied covenant that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing." 5 Williston on Contracts § 670, pp. 159-160 (3d ed. 1961).

Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 130, 207 A.2d 522, 531 (1965); *Association Group Life, Inc. v. Catholic War Veterans*, 61 N.J. 150, 153, 293 A.2d 382, 384 (1972); *Bak-A-Lum Corp. of America v. Alcoa Building Products, Inc.*, 69 N.J. 123, 129-30, 351 A.2d 349, 352 (1976). Such a broad principle, however, is of little assistance in the present factual situation.

Appellants rely primarily on *Fitt v. Schneidewind Realty Corp.*, 81 N.J. Super. 497, 196 A.2d 26 (1963), the leading case on unlawful interference with prospective economic advantage. There, the Superior Court of New Jersey stated:

> In order for the plaintiff to prevail in an action such as this, the court must find from the evidence that but for defendants' wrongful acts it is reasonably probable that plaintiff would have effected the sale of the property. . . . A wrongful act is one which in the ordinary course of events will infringe upon the rights of another to his damage, or one which is done with the purpose of benefiting the acting party at the other's

expense and is not done in the exercise of an equal or superior right.

Id. at 504, 196 A.2d at 30.

The Schultzes failed to sustain their dual burden of establishing both a wrongful act, an act "not done in the exercise of an equal or superior right", and a reasonable probability of effecting a sale. The record establishes that Chevron merely awaited written notice of an acceptable bona fide offer. An implied covenant of fair dealing does not vitiate Chevron's contractual right to such notice, and we consider that right to be at least equal to any alleged "right" in the Schultzes to demand a waiver. Nor can we say that the record establishes a reasonable probability of a sale but for Chevron's acts. "Feelers", or mere expressions of interest in the property are insufficient to support the requirement of reasonable probability. We think a bona fide offer would be necessary to establish anything more than a possibility.

Appellants also rely on *Shell Oil Co. v. Marinello,* 63 N.J. 402, 307 A.2d 598 (1973), a case which is superficially related to the facts before us. *Shell* involved a lease and dealership agreement between a major oil company and a service station operator who sought to avoid enforcement of one of the terms of the lease. The lease could be terminated by Shell upon 30 days' notice, and the dealership agreement upon 10 days' notice. Shell gave the dealer six weeks' notice of termination of both the lease and the dealership agreements, without stating any reasons for its action. The dealer was granted equitable relief upon the trial court's holding that "there was an implied covenant in said lease and agreement on the part of Shell not to terminate the relationship without good cause, and these instruments must be reformed to include such covenant; . . ." *Id.* at 406, 307 A.2d at 600. Citing "the public policy of this State affecting such [a] relationship," the Supreme Court of New Jersey indicated

full agreement with the basic determination of the trial court that Shell had no legal right to terminate its relationship with Marinello except for good cause, *i.e.,* the failure of Marinello to substantially comply with his obligations under the lease and dealer agreement.

Id.

Facts deemed significant by the *Shell* court in reaching its decision included the gross disparity in bargaining power between Shell and Marinello, resulting in Shell's ability to dictate the terms of the agreements; the grossly unfair contractual provisions at issue; and the clear tendency to injure the public. The absence of these factors clearly distinguishes *Shell* from the case before us. First, the record does not substantiate disparity in bargaining power between the Schultzes and Morris, the original parties to the lease. Even assuming the superior resources of an oil company vis-à-vis a typical dealer, we are not apprised of appellants' position as owner-dealers vis-à-vis the typical dealer-franchise. Second, we see no reason to compare a unilateral right to terminate a dealership with a right of first refusal. The New Jersey court characterized the former as "grossly unfair", noting that the dealer has "everything to lose". *Id.* at 409, 307 A.2d at 602. In contrast, a lessee's right of first refusal is a means of protecting him without placing a burden on the lessor; it has the effect of creating two prospective purchasers for every offer received by the owner. Finally, we see nothing inherent in the lease provision which clearly tends to the injury of the public in any way comparable to the provision in the *Shell* agreement.

In short, we do not believe that the Supreme Court of New Jersey would declare Chevron's prior right to purchase "void as against the public policy of [New Jersey]", *id.* at 410, 307 A.2d at 603, as it did the termination provision in *Shell.*

III.

Having accepted the validity of the lease provision granting a prior right to purchase, we think that on any theory of liability, a prerequisite to recovery is a showing that appellants received a bona fide offer. We have examined record evidence of the "offers" received by Schultze and conclude that the district judge correctly held as a matter of law that none constituted a bona fide offer. Accordingly, the judgment of the district court will be affirmed.

ADAMS, *Circuit Judge*, dissenting.

In recent years, the courts of New Jersey have adopted the principle that a covenant of good faith and fair dealing is to be implied in contracts governed by the law of that state. Consequently, our task in the present case, at least it seems to me, is to determine whether a jury could find such covenant to have been breached by the refusal of a major oil company to waive its preemptive right to purchase the station of one of its dealers, when the dealer is forced to sell his business for reasons of health and when the company has no intention of buying the property. Since, unlike the majority, I do not believe that on the evidence before us a New Jersey court would preclude such a verdict as a matter of law, I must respectfully dissent.

A.

From 1963 to 1973, the plaintiffs, Robert and Edith Georgianna Schultze, were the owners and operators of a gasoline station located in the Borough of Mountain Lakes, New Jersey. Initially, the station was financed by a loan guaranteed by Morris Oil Co., and in association with that financing, Morris Oil and the Schultzes entered into a lease and then a lease-back arrangement. The Schultzes leased the property upon which their station stood to Morris Oil for fifteen years, terminable by Morris Oil at will, and

with provision for renewal at the option of Morris Oil. Morris Oil in turn sublet the same property to the Schultzes with the proviso that the Schultzes sell gasoline distributed by Morris Oil.

Contained in the lease from the Schultzes to Morris Oil was the "first refusal" provision at issue here, which conditioned the Schultzes' power to sell the gasoline station upon their first submitting any bona fide offer to purchase to the oil company, and permitting the oil company to buy the property based on the terms of such offer.[1]

In June 1968, Morris Oil conveyed its interests in the lease and sublease, along with its other assets, to Chevron Oil Company. Two years later, during the fall of 1970, the Schultzes' family physician informed them that the demands of health required Mrs. Schultze and one of their daughters to move to a warmer climate. Faced with this warning, the Schultzes offered to sell the business to Chevron so that they could relocate in Florida.[2]

Chevron declined this offer in the fall of 1970,[3] and the Schultzes thereupon requested a waiver of Chevron's right

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1. The clause reads:

Lessee, as long as this lease or any renewal hereof is in effect, shall have the prior right, to be exercised by it or by its nominee, to buy the whole or any part of the leased premises or any larger parcel of which the leased premises are a part. If Lessors receive from a third party an acceptable bona fide offer to buy such property, Lessors shall forthwith give Lessee written notice thereof together with a copy of such offer. Lessee or its nominee shall have thirty (30) days from the receipt of such notice and offer to buy such property at the terms of such offer relating to such property. If Lessee or its nominee fails to exercise this option, Lessors may, within ninety (90) days after receipt of such written notice by Lessee, sell such property but only for a price and upon terms of payment and upon other terms which are identical to those set forth in the notice of Lessee. In the event of such sale to a third party, such sale shall be made subject to the terms and provisions of this lease, including, but without limiting the generality of the foregoing, the provisions of this section. Lessee agrees to notify Lessors in writing of any nominee designated for the purpose of this section and warrants that such nominee will be financially responsible. Lessors agree to recognize and accept any such designation of nominee for the purpose of this section.

2. Since this case is before us on a dismissal after the close of plaintiffs' and defendant's case, we must, of course, determine whether a jury could reasonably find relief warranted, given every favorable inference to the plaintiffs. *See Patzig v. O'Neill*, typescript pp. 4-5 (No. 77-1190, 3d Cir. 1978); *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969). From the evidence presented a jury could find that in the course of their offer, the Schultzes conveyed to Chevron the reason for their decision to abandon their business.

3. N.T. 2.95-2.96.

of first refusal so that they might proceed with plans to sell the station and move south. Such a waiver was not forthcoming until two years later, in September 1972. In the interim, according to the Schultzes, Chevron's right of first refusal had deterred at least three purchasers, who had contemplated offers of between $120,000 and $168,000, from bidding on the service station. And the Schultzes had been forced to move to Florida before any sale could be consummated.

In late 1972, the Schultzes' station, which then was being operated by an employee, and which had been valued by Chevron's appraiser at $148,000, was sold for $85,000.

The Schultzes brought an action against Chevron for the difference between the amount of the offers which they claim were deterred by Chevron's conduct and the actual sum realized on the sale. Their claim was that by delaying two years in waiving a right which it did not intend to exercise, Chevron breached an implied covenant of good faith and fair dealing of the lease agreement, and that as a result of that breach they had been deprived of the full worth of their property. The Schultzes also claim recovery for tortious interference with business opportunities.

While the majority appears to view the tort and contract actions as inextricably intertwined, I believe the issues raised by each claim are analytically distinct. However, in light of my conclusion that the case should have gone to the jury on the alleged breach of the covenant of good faith, I do not reach the tortious interference claim.[4]

At the close of evidence by both the plaintiffs and the defendant, the trial judge refused to send the case to the jury, and instead granted a directed verdict for the de-

4. *Cf. Associated Group Life, Inc. v. Catholic War Veterans*, 61 N.J. 150, 293 A.2d 382 (1972) (same actions gave rise to claim for breach of good faith covenant and tortious interference with economic advantage). If Chevron's actions breached the implied covenant of good faith and fair dealing, recovery may also be available on a tort theory. However, if Chevron's actions were taken in good faith, it would appear that the majority's conclusion is correct, and no recovery is available, since there has been no violation of duty.

fendant. The appeal from that directed verdict is now before us.

B.

Traditionally, at common law the courts do not recognize a general duty of "good faith" between contractual partners.[5] In classical theory, at least, the contract created its own world: the obligations of the parties arose exclusively out of the freely-bargained assent of both parties as memorialized in the explicit terms of the agreement.[6] Private assent not public law was to structure private relations, and courts were to have no power to alter what parties had written or contracted. In practice, however, limitation to the letter of the contract expressing the intention of the parties as the sole determinant of the contractual relationship was admixed with a concern for substantive justice. Slowly, sharply-pointed contractual powers became hedged about by equitable duties and implied contractual terms.[7]

Thus during the last generation, the courts of New Jersey have engaged in the explicit "development of those principles of equity, fair dealing, and good faith . . . which breathed new life-giving honesty into the bare contractual

5. *See e.g. Kessler & Gilmore Contracts, Cases & Materials*, 912-13 (2d ed. 1970), Powell, *Good Faith in Contracts* 9 Current Legal Problems 16, 25 (1956). *But cf.* Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 670 (1963) (law merchant absorbed ecclesiastical concern with commercial morality).

6. See Kessler & Fine, *Culpa In Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study*, 77 Harv. 401, 409 (1964).

7. Thus, for instance, a promisee is under an implicit duty not to interfere with the performance of the promissor *3 Corbin on Contracts* § 571 (1960) and in order to be entitled to full contract damages, a plaintiff must have complied with the judicially constructed duty to mitigate his injuries. *See Kessler & Gilmore, supra* note 5 at 976-989. In a more specialized context, a requirement of an architect's certificate is generally understood to be eliminated if the refusal of the certificate is not "in good faith." *Corbin, supra* § 651.

The process of leavening contractual rights with equitable duties reached a new plateau with the Uniform Commercial Code's enactment of various provisions effecting a duty of commercial reasonableness and its general requirement of good faith. *See Farnsworth, supra* note 5; Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195 (1968).

relationship."[8] In a number of cases, the naked terms of a contract, however explicit, were held not to constitute the final balance of decision. New Jersey Courts instead judged contractual provisions against the demands of fair dealing and public policy. As a result, they disregarded contractual terms exculpating manufacturers from liability for the defects of their products[9] and terms severing a real estate agent's commission from the necessity for ultimate purchase by a prospect whom the agent obtained.[10] Moreover, the New Jersey judiciary has implied terms into contracts where fair dealing so required. Courts have deduced from the right of first refusal a covenant by the grantor not to burden his ability to sell the property to which the right pertains,[11] and have read a warrant of habitability into residential leases.[12]

More generally, a solid line of New Jersey cases has created an obligation of good faith and fair dealing from provisions giving insurance companies the right to try and settle cases against their insureds.[13] These authorities hold insurance companies liable to policy holders for the companies' unfair refusals to settle claims against the insureds which exceed policy limits. Indeed, in *Fireman's Fund Insurance Co. v. Security Insurance Co.*[14] the New Jersey Supreme Court recently held that a failure to abide by the implied good faith covenant made an insurer liable for a settlement which the insured negotiated upon such

8. *Rova Farms Resort, Inc. v. Investors Insurance Co.*, 65 N.J. 474, 323 A.2d 495, 504 (1974).

9. *Henningsen v. Bloomfield Mtrs., Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

10. *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967).

11. *Wellmore Builders, Inc. v. Wannier*, 49 N.J. Super. 456, 140 A.2d 422 (App. Div. 1958).

12. *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970).

13. *Radio Taxi Service, Inc. v. Lincoln Mutual Ins. Co.*, 31 N.J. 299, 157 A.2d 319 (1960); *Bowers v. Camden Fire Ins. Assoc.*, 51 N.J. 62, 237 A.2d 857 (1968); *Rova Farms Resort, Inc. v. Investors Insurance Co. of America*, 65 N.J. 474, 323 A.2d 495 (1974); *see Estate of Louis Penn v. Amalgamated General Agencies*, 148 N.J. Super. 419, 372 A.2d 1124 (App. Div. 1977); *Western World Insurance Co. v. All State Insurance Co.*, 150 N.J. Super. 481, 326 A.2d 177 (App. Div. 1977) (same relationship implied into contract between primary insurer and excess carrier).

14. 72 N.J. 63, 367 A.2d 864 (1976).

breach, despite the fact that "the language [of the policy] read literally gives the insurer the absolute unrestricted right to exercise those powers."[15]

The covenant of good faith and fair dealing and the actions founded upon it are not limited to the quasi-fiduciary circumstances surrounding the delegation of the right to settle claims that have been asserted against the policy holder. In *Association Group Life Inc. v. Catholic War Veterans*,[16] the New Jersey Supreme Court upheld a cause of action for breach of implied warrant of good faith by an insurance brokerage against the underwriter it formerly represented. The underwriter had arranged with the broker's customer to have the customer replace the broker in administering the policy. Although the contract provided that the customer should have the right to appoint a new broker, the New Jersey Supreme Court stated:[17]

> We agree . . . that [the underwriter] did not literally violate Article V in taking the above action. However, we are convinced that a jury could find that [the underwriter] breached its covenant of good faith which is implied in all contracts. *Palisades Properties Inc. v. Burnetti*, 44 N.J. 117, 130 (1965).

The activities of the underwriter, it was held, were "not contemplated by the spirit of the contract and fell short of fair dealing."[18]

More recently, in *Bak-A-Lum Corp. v. Alcoa Building Products*,[19] the New Jersey Supreme Court granted contract damages to a dealer of aluminum siding whose supplier had terminated the exclusivity of the plaintiffs' dealership without notice. Although the terms of the contract between the parties allowed the supplier to terminate the dealership at will, the New Jersey Supreme Court held that where, with the supplier's knowledge, the dealer had

15. 72 N.J. at 72; 367 A.2d at 869.

16. 61 N.J. 150, 293 A.2d 382 (1972).

17. 61 N.J. at 155, 293 A.2d at 384.

18. 61 N.J. at 154, 293 A.2d at 384.

19. 69 N.J. 125, 351 A.2d 349 (1976).

embarked on a warehouse expansion in reliance on the exclusivity of its dealership, a termination without reasonable notice violated the implied covenant of good faith. The Court said:

> It may be true that defendant ordinarily would be under no strictly legal obligation to inform plaintiff that it was about to terminate its exclusive dealership . . . . However, we have been at pains recently to point out that . . . "in every contract there exists an implied covenant of good faith and fair dealing."
>
> . . . In [the circumstances here] the defendant's selfish withholding from the plaintiff of its intention seriously to impair its distributorship although knowing plaintiff was embarking on an investment substantially predicated upon its continuation constituted a breach of the implied covenant of dealing in good faith of which we have spoken.[20]

The New Jersey courts thus no longer conceive of a contract solely as a private treaty in a bellicose state of

20. 69 N.J. at 130, 351 A.2d at 352. *See Palisades Properties, Inc. v. Brunetti*, 44 N.J. 117, 207 A.2d 522 (1965) (New Jersey law implies covenant of good faith into every contract); *Mortgage Corp. of New Jersey v. Manhattan Savings Bank*, 71 N.J. Super. 489, 177 A.2d 326 (1962) (vigorously applying the principle of New York law that "A construction should not be given to a contract which will place one of the parties at the mercy of the other").

Another paradigm case illustrating the sensitivity of the New Jersey courts to the dictates of good faith and fair dealing is *Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598 (1973). There, the court read a requirement that cancellation be "for cause" into the unilateral right of an oil company to cancel a dealer's lease. The majority distinguishes *Marinello* on the ground that the Schultzes may be in a stronger bargaining position than an ordinary "dealer-franchisee," and Morris Oil Company may have been in a weaker position than a major oil company.

As to the first suggestion, since the Schultzes' position was wholly financed by the oil company, and the oil company retained the right to cancel its lease at will, it is difficult to see how the Schultzes' bargaining leverage was more powerful than that of the ordinary franchisee. This is particularly so in view of the fact that the Schultzes labored under the medical requirement that they move promptly to a warmer climate.

And the second suggested basis for distinction would appear to cut both ways. If Morris' bargaining position was significantly less powerful than that of a major oil company, it would follow that the Schultzes could expect that in enforcing its right of first refusal, Morris would be forced to be more accommodating than a major oil company, since its position would not be as strong. The accession of Chevron to the position as the Schultzes' lessee/lessor would defeat such expectation.

nature, conferring privileges to be used at will out of avarice, pique or spite. Rather, a contract, particularly one involving a long-term relationship which places the welfare of one party in the hands of the other,[21] is understood to reflect the ethical tenor of the society within which the contract is formed, and creates the expectation that the powers it grants will be reasonably and equitably exercised.[22] The law of New Jersey protects such expectations. An exercise of contractual rights so arbitrary or unfair as to amount to bad faith is considered to constitute a contractual breach compensable by damages.[23]

21. *See Shell Oil v. Marinello, supra* 63 N.J. at 409, 307 A.2d at 602 (franchisee has everything to lose from termination of franchise, oil company loses little); *Amerada Hess Corp. v. Quinn*, 143 N.J. Super. 237, 253, 362 A.2d 1258 (L. Div. 1976) (noting "inevitable intertwining of the franchisee's livelihood with the franchise").

22. As Professor Unger expressed the general trend:

> The main reaction to the conflict between legality and solidarity is a greater willingness to regard as part of the law certain moral conceptions that do not seem capable of development and application in ways consistent with the ideals of generality and autonomy. For these conceptions can neither be reduced to rules nor divorced from views about moral obligation.
>
> An example in private law is the idea of good faith. . . . To act in good faith is to exercise one's formal entitlements in the spirit of solidarity. The good faith standard requires one to find in each case a mean between the principle that one party may disregard the interests of the other in the exercise of his own rights and the counter principles that he must treat those interests exactly as if they were his own.

R. Unger, Law in Modern Society, 210 (1976).

See R. Pound, An Introduction to the Philosophy of Law, 188 (1922) ("Men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith.").

It may be, of course, that the earlier conception of the contracting parties as atomistic entities bound only by the formalities of the contractual terms reflected the prevailing individualistic and laissez-faire attitudes of the broader society. Such arid formalism ill befits the current tone of the New Jersey courts, however.

23. The majority acknowledges the existence of the covenant of good faith in New Jersey contracts, but avoids that precept with the comment that "Such a broad principle, however, is of little assistance in the present factual situation." Majority opinion at 5.

This casual dismissal of a prominent feature of New Jersey's judicial landscape seems at odds with the role of a judge in the application of common law. Common law evolves through the interaction of abstract doctrine and palpable fact in the context of individual disputes. The judge must trace upon the circumstances of the specific case the projection of doctrinal developments. And conversely the court's task is to measure emerging legal precepts against the demands of practicality and conscience in particular factual matrices. But he is not free to slight a doctrine simply because its application is difficult.

C.

The question, then, is whether under the foregoing principles the Schultzes have adduced sufficient evidence to allow a jury to find that the actions of Chevron breached the implied covenant of good faith and fair dealing which certainly exists under New Jersey law today.[24]

As the majority notes, a right of first refusal clause is not void *per se* as illegal or unconscionable.[25] But such a conclusion only begins the relevant inquiry, for the unfair or bad faith use of a concededly legal contractual term may still subject the abuser to an action for damages. Possession of a patent is not illegal, yet use of that patent in violation of an exclusive licensing agreement may generate civil liability. And a perfectly valid contractual provision allowing a party to demand assurance of compliance before completing his own performance will not permit the party to withhold performance for the purpose of harassment or a desire to obtain better payment terms. Similarly, here, the Schultzes do not challenge the validity of the preemptive rights in the abstract, but rather the use to which Chevron put those powers.

The right of first refusal clause before us in its inception constituted an effort by the oil company to secure the opportunity to retain the advantage of the good will developed by the service station which it financed. The clause allowed the oil company to assure the continued use of the station as an outlet for its products, while at the same time guaranteeing the dealer the right to dispose of his interest in the property. If a sale were contemplated,

24. Under New Jersey Law the issue is one for the jury. *Association Group Life v. Catholic War Veterans*, 61 N.J. 150, 151, 293 A.2d 382, 384 (1972); *Bowers v. Camden Fire Ins. Assn.*, 51 N.J. 62, 74, 79, 237 A.2d 857, 863 (1968).

25. It should be observed, however, that there is some conflict between the law's hostility toward restraints on alienation and the right of first refusal. *See Wellmore Builders, Inc. v. Wannier*, 140 A.2d 422, 428, 49 N.J. Super. 456 (1958); ALI Restatement of Law of Property § 413(2)a and comment (f) (1941).

the oil company had the right to purchase the station, and operate it itself. In theory, as the majority puts it,

> a lessee's right of first refusal is a means of protecting him without placing a burden on the lessor; it has the effect of creating two prospective purchasers for every offer received by the owner.[26]

It is not, however, the theory underlying the right of first refusal about of which the Schultzes complain, but the reality of its operation in the context of this case. They contend that the evidence here showed that potential buyers of service stations refuse to submit firm offers to purchase until the lessee, here the oil company, has waived its right of first refusal. There is testimony from which a jury could conclude that such was the precise effect of the clause in this case. It not only created a "burden" on the Schultzes, but in practice prevented them from "receiving" offers.[27] Thus, in effect, the Schultzes could sell only with Chevron's approval.

If Chevron used the clause to preserve its opportunity to purchase the facility when the Schultzes decided to sell it, no objection could validly be raised. But the Schultzes' position is that Chevron withheld its waiver in a manner that was both unfair and unreasonable under the circumstances. If Chevron unfairly used the clause not to preserve its right to purchase but to extract better terms for a subsequent lease, a jury could find that such coercion fell outside of the bounds of fair dealing which implicitly cabined the contractual power.

26. Majority opinion at 7.

27. Kellogg Birdseye, an experienced speculator in gasoline stations, who had manifested an interest in the Schultzes' property but refused to continue negotiations in the absence of a waiver, testified that it was his policy to refuse to negotiate purchase arrangements with dealers unless he received a written release of the first refusal right. N.T. 1.65. *See* N.T. 7-8 (December 2, 1976). Similarly, there was testimony that one Wright Hitt had expressed an interest in buying the station, contingent upon first obtaining Chevron's waiver. N.T. 17-19 (December 2, 1976). And Robert Becker, a real estate agent who testified that he had been "ready, willing and able" to buy the Schultzes' property for $120,000, N.T. 1.80, 1.74, indicated that one of the reasons the purchasee was not consummated was a failure to obtain a release from Chevron. N.T. 1.84-1.85.

The restriction imposed by Chevron's preemptive rights on the ability of the dealer to dispose of its property bore particularly heavily on the Schultzes because the health of Mrs. Schultze necessitated relocation in Florida. Medical considerations counseled reasonable dispatch in leaving, and resettlement would require prompt disposition of the station. For without personal management by the Schultzes, the good will associated with the station would dissipate and sale negotiations from Florida would perforce be less effective than if performed in person. Yet, despite demand, the release of the right of first refusal was not proffered until the month before the Schultzes had to depart for Florida, although there is evidence that Chevron knew of both the need by the Schultzes to relocate and the effect of its failure to waive the first refusal right.

It could be asserted, of course, that the burden imposed by Chevron's preemptive rights was freely bargained for in the initial contract between the Schultzes and Morris Oil, and that Chevron's refusal to waive its preemptive rights was a simple good faith exercise of its contract privilege. Such argument, however, appears to rest on the premise that Chevron had some interest in purchasing the service station. Absent evidence of such an intent, Chevron could not be said to be asserting the interests protected by the clause. And its actions could be deemed by a jury to be a mere arbitrary infliction of a burden upon the Schultzes without a justifiable business reason.

In fact, there is testimony that Chevron had decided against purchase of the station as early as 1970, two years before it finally granted the release.[28] Moreover, John Ginos, Chevron's retail sales manager, testified that in August of 1971, in response to a request for a waiver from the Schultzes, he had stated that he could "see no problem with that" and had avowed that he would obtain the waiver.[29] Yet, the release was not delivered for a year

28. N.T. 2.95, 3.9, *cf.* N.T. 5 (December 2, 1976).
29. N.T. 2.50-2.51.

after that statement, during which time Chevron attempted to negotiate a new lease with the Schultzes. It was thus possible for the jury to infer that Chevron's refusal to grant the waiver had nothing to do with the rights which the provision was designed to secure, but instead amounted to an attempt to coerce the Schultzes into new leasing arrangements by holding their equity in the station hostage.

In my judgment, under New Jersey law, such a course of action by Chevron could reasonably be found by the trier of fact to violate the implied covenant of good faith and fair dealing. Accordingly, I believe that the case should not have been taken from the jury, and the trial judge's action in so doing requires reversal of the judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B—Court of Appeals Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1152

ROBERT K. SCHULTZE and EDITH GEORGIANNA SCHULTZE, his wife,

Appellants,

vs.

CHEVRON OIL CO., a California Corporation

(D.C. Civil No. 74-132)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: ALDISERT and ADAMS, *Circuit Judges*
and HANNUM, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on April 24, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 13, 1976, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

M. Elizabeth Ferguson
Chief Deputy Clerk

June 12, 1978

*Honorable John B. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C—Denial of Petition for rehearing on En Banc

United States Court of Appeals
For the Third Circuit
No. 77-1152
Sur Petition for Rehearing

Present: Seitz, *Chief Judge,*
and Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth and Higgenbatham, *Circuit Judges,* and Hannum, *District Judge**

This petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of the Court and to all the other available Circuit Judges of the Circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the Circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

By the Court,
Aldisert
Judge

Dated: July 17, 1978

*Honorable John B. Hannum, of the U.S. District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX D—Dismissal Opinion in District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT K. SCHULTZE and EDITH GEORGIANNA SCHULTZE, his wife,

Plaintiffs,

vs.

CHEVRON OIL COMPANY, a California Corporation,

Defendant.

Civil 74-132 VOLUME IV

Trenton, New Jersey
December 10, 1976

Before the
HONORABLE CLARKSON S. FISHER, USDJ,
and a Jury.

Appearances:
MILLER & LOOKHOFF
For the Plaintiffs
BY: IRVING G. SCHLEIMER and
ROBERT S. MILLER
WILENTZ, GOLDMAN & SPITZER
For the Defendant
BY: FRANCIS X. JOURNICK

(Jury not present.)

THE COURT: The defendant has made a motion pursuant to Federal Rules of Civil Procedure 50(a) for a directed verdict.

Now, all during this case the plaintiffs have contended that the defendant should have granted them a written waiver or release of its first right of refusal. However, before the defendant could possibly be required to give a release in writing, there must be, first, a showing that any legally sufficient waiver occurred at all.

On this point, the Court finds that the statute of frauds, N.J.S.A. 25:1-5(d), requires that a waiver of the right of first refusal be in writing. See *George v. Meinersman,* 119 N.J.L. 460 (E&A 1937); *Droutman v. E.M. & L. Garage,* 129 N.J. Eq. 1, 3 (Ch. 1940), *aff'd.* 129 N.J. Eq. 545 (E & A 1941), and there is no evidence of such a writing which would permit the plaintiff to assert its interference claim.

The Court finds *Van Dusen Aircraft v. Terminal Construction Corp.,* 3 N.J. 321 (1949) and *Salvatore v. Trace,* 109 N.J. Super. 83, *aff'd. p.c.* 55 N.J. 362 (1970) distinguishable. In addition, the Court finds that the defendant is not estopped from relying upon the statute of frauds where there is no showing that plaintiff detrimentally relief upon any representation made by the defendant. Chevron was negotiating for the station as any prospective buyer might, quite apart from the right of refusal.

Finally, even if the statute of fraud does not apply, there is no evidence of an intentional relinquishment of any known right by Chevron. There is no testimony before the Court here which suggest that defendants specifically, intentionally and decisively waived its right of first refusal. *Beneficial Finance Company v. Norton,* 76 N.J. Super. 577 (App. Div. 1962).

The fact that Chevron may have at times stated that it

was no longer interested in purchasing the property cannot be construed as an intentional waiver of its right of first refusal. It had the right to negotiate for the property like any other prospective buyer and its decision not to negotiate further cannot fairly be construed as an intentional relinquishment of its contractual right not only to review any bonafide offer eventually made, but further to insure that all of its rights under the lease and sublease would be protected.

By far, the most significant reason why the defendant's motion must be granted can be found in plaintiffs' complete failure to prove that they were damaged by the alleged interference. Some guidance on this issue may be obtained from *Myers v. Arcadio, Inc.,* 73 N.J. Super. 493, 498 (App. Div. 1962), where the Court said:

> "The mere proof of . . . interference is sufficient to give rise to the relief here demanded. There must be proof that the interference resulted in damage to the plaintiff. This means only that if the acts of the defendant had not been done, there is a reasonable probability that the agreement . . . would have been performed."

Now, as everyone recalls, there was the Birdseye incident which plaintiffs freely concede was not a bonafide offer; there were the negotiations with Hitt, which resulted, that is, taking the plaintiff's testimony, that there was an offer to purchase, and that not having a waiver of refusal, they were sent to Chevron to obtain it. Obviously, there is nothing put in writing which was submitted under Clause 11 under the master lease in order to make this bonafide.

Now, from all that has been presented, there is no evidence which suggests a reasonable probability that the plaintiffs would have sold their station to a third party if the defendant had given a written waiver of its right of first refusal.

From the evidence, the jury could not so find. One could only conjecture as to the actual reasons why no sale

was made for several months. Any number of factors could have contributed to the failure, and the evidence does not suggest that the continued presence of the right of first refusal was the primary or even probable cause.

At worst, the plaintiffs' failure to provide a written waiver of the defendant's right of first refusal—assuming one was required—resulted in a relative impairment of plaintiffs' ability to obtain firm offers from third parties. That is, it might have been easier for the plaintiffs to obtain firm offers if the contract had been waived in writing.

If the jury were to find that the plaintiffs were damaged to this extent, it would only be permitted to award damages based upon this relative impairment. An assessment of such damages would be based on pure conjecture. It would not be able to award damages based upon the value of a firm offer which might have been given since, as noted before, there is no evidence suggesting a probability that such an offer would have been made had a written release been given. Such a conclusion would be pure conjecture.

Virtually, the same contract provision which granted Chevron the right of first refusal has been valid in New Jersey. *Guaclides v. Kruse,* 67 N.J. Super. 348, 356 (App. Div. 1961), *cert. denied* 36 N.J. 32 (1961), and this Court finds no overreaching by the defendant in securing this contractual right.

Although the terms of the provision might not have been the most favorable insofar as the plaintiffs were concerned, if they felt sufficiently aggrieved by the continued assertion of the right, they had other remedies at that time. As it was, the plaintiffs granted the defendant this preemptive right that Chevron had every time to rely upon.

Insofar as the damage, the personal injury claim is concerned, of course, I'm finding here that there is no

cause of action and the motion is granted. But again, no authorities have been presented, nor do I find any authority for the mental anguish of the so-called personal injury claim.

Gentlemen, the Court wants to express its sincere appreciation for your handling the case. Both parties were represented as well as anyone could expect, and the help to the Court by way of briefs and authorities provided to me in the disposition of this motion has been invaluable. The Court thanks alll concerned. It is a lawsuit. Someone has to win, someone has to lose. Unfortunately, it comes down to the Court having to make its decision, what it deemed proper from the evidence.

Thank you very much.

(Hearing adjourned at 1 P.M.)

APPENDIX E—Complaint

UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF NEW JERSEY
FILE NO. 74-132

ROBERT K. SCHULTZE and
EDITH GEORGIANNA SCHULTZE,
his wife,

Plaintiffs,

-vs.-

CHEVRON OIL CO., A California Corporation,
Defendant.

CIVIL ACTION COMPLAINT

Plaintiffs, Robert K. Schultze and Edith Georgianna Schultze, his wife, residing in Florida, complaining against the defendant, Chevron Oil Co., a California Corporation having a place of business at 1200 State Street, Perth Amboy, New Jersey, say that:

FIRST COUNT

1. Plaintiffs are citizens of the State of Florida and defendant is a corporation incorporated under the laws of the State of California and has a principal place of business in a state other than the State of Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

2. In or about April, 1963, plaintiffs gave to Morris Oil Company, Inc., a New Jersey corporation and a subsidiary of defendant, an option or right of first refusal to buy the gasoline service station and the property on which said station is located, known as 12 Baldwin Lane in the Borough of Mountain Lakes, Morris County, New Jersey (hereinafter referred to as "service station") which plaintiffs owned.

3. The aforesaid right of first refusal was assigned by Morris Oil Company to defendant by an unrecorded assignment as set forth in an Agreement dated June 30, 1968, between defendant and Morris Oil Company wherein defendant succeeded to the interest of Morris Oil Company in said right of first refusal.

4. Sometime in the latter part of 1970, plaintiffs advised the defendant that they intended to sell their service station and asked if defendant desired to exercise its right of first refusal. Through its agents and employees, defendant informed plaintiffs that it was not interest. ' in purchasing said property and that it was unnecessary to have this fact expressed in writing.

5. In or about the Spring of 1971, plaintiffs received a bona fide offer to purchase said service station from one Kellogg Birdseye (hereinafter referred to as "Buyer"), said offer being in the total amount of $168,000.00.

6. Upon the insistence of Buyer's attorney, plaintiffs requested of defendant that defendant provide a written release or waiver of its right of first refusal.

7. Subsequent to the aforesaid request, defendant, through its agents and employees, informed plaintiffs that it wished to exercise its right of first refusal.

8. During the course of the following months, defendant continued to advise plaintiffs that it would purchase the aforesaid service station, that an option agreement and an option check had been prepared, and that the aforesaid purchase would be consummated by the end of the year 1971 or early 1972.

9. Actin in reliance upon defendant's representations,

plaintiffs made arrangements to purchase a business in the State of Florida and to relocate to the State of Florida.

10. In the early part of 1972, defendant advised plaintiffs that it would not exercise its option to purchase but would substitute therefor a fifteen (15) year lease with an option of renewal and would arrange for the discounting of such lease with a bank.

11. In or about August of 1972, plaintiffs executed an option agreement for lease, which option agreement had been prepared by the defendant's attorneys, but defendant failed and refused to execute said agreement.

12. On or about March 12, 1973, having been unable to consummate the sale to Kellogg Birdseye by reason of defendant's failure and refusal to give a written release of its right of first refusal to plaintiffs, plaintiffs sold said service station for the sum of $85,000.00.

13. Defendant unreasonably and unjustifiably failed and refused to deliver to plaintiffs a release of defendant's right of first refusal and thereby prevented plaintiffs from consummating its sale with the aforementioned buyer.

WHEREFORE, plaintiffs demand judgment against defendant for the sum of $83,000.00, together with interest and costs of suit.

SECOND COUNT

1. Plaintiffs repeat all of the allegations contained in the First Count of this Complaint and incorporates them hereby by reference.

2. The aforesaid right of first refusal was invalid under New Jersey law.

3. Defendant intentionally and unjustly interfered with the plaintiffs' right to sell their business and real estate to other persons.

WHEREFORE, plaintiffs deemed judgment on this Count for the sum of $83,000.00, together with interest and costs of suit.

THIRD COUNT

1. Plaintiffs repeat all of the allegations contained in the First Count of this Complaint and incorporates them herein by reference.

2. Prior to negotiating the sale of their business and real estate to Kellogg Birdseye, plaintiffs informed defendant that they were in ill health and had been advised by their physician to sell their business in New Jersey and move to a warmer climate.

3. Defendant unreasonably and unjustifiably failed and refused to release its right of refusal to purchase the property and business in question within a reasonable time after being notified that plaintiffs intended to sell said business and real estate because of ill health.

WHEREFORE, plaintiffs demand judgment on this Count for the sum of $83,000.00, together with interest and costs of suit.

FOURTH COUNT

1. Plaintiffs repeat all of the allegations of the First and Third Counts of this Complaint and incorporate them herein by reference.

2. By reason of defendant's repeated and continued refusal to exercise its right of first refusal or to execute the aforesaid lease agreement, or to deliver to plaintiffs a waiver of its right of first refusal, plaintiffs were caused to sustain diverse and severe mental stress and physical ailments, suffered severe mental anguish, pain and suffering, incurred substantial medical expenses, and suffered permanent injury and damage to their health.

WHEREFORE, plaintiffs demand judgment against defendant on this Count for the sum of $250,000.00, together with interest and costs of suit.

FIFTH COUNT

1. Plaintiff repeats all of the allegations contained in the First, Second, Third and Fourth Counts of this Complaint and incorporate them herein by reference.

2. The actions of defendant were intentional, willful, wanton and malicious, entitling plaintiffs to exemplary damages.

WHEREFORE, plaintiffs demand judgment against defendant for the sum of $1,000,000.00, together with costs of suit.

JURY DEMAND

Plaintiffs demand trial by jury on all the issues set forth.

s/ Robert S. Miller
ROBERT S. MILLER
Attorney at Law of New Jersey

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-601

ROBERT K. SCHULTZE and
EDITH GEORGIANNA SCHULTZE, his wife,

Petitioners,

vs.

CHEVRON OIL CO., a California corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

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AUTHORITIES CITED:

5 Williston on Contracts, Section 670, Pages 159 to 160 (Third Edition 1961) 3

OPINIONS

The Opinions of the Court of Appeals are reported at 579 F.2d 776.

REASONS FOR DENYING THE WRIT

The Petitioners seek to justify their petition by arguing that the implied contractual covenant of good faith and fair dealing is before the Court *"de novo"* in this case and that there is a conflict between the Third and Fifth Circuits, the latter allegedly finding such an implied covenant while the former rejected same. Neither of these arguments, however, measures up.

Without even considering whether the implied covenant of good faith and fair dealing is before this Court *"de novo,"* such an implied covenant is a matter of New Jersey law, not "federal" law (this is a diversity action governed by New Jersey law) and was recognized by the Third Circuit in this case. The Third Circuit Opinion reads:

> "Apparently recognizing that the express terms of the quoted provision were unfulfilled by them, appellants argue that, in any event, Chevron violated its duty of fair dealing by not executing a written waiver of its prior right to purchase. They correctly state that New Jersey Courts recognize the principal that 'in every contract there is an implied covenant that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good and fair dealing' 5 Williston on Contracts, Section 670, Pages 159 to 160 (Third Edition 1961)' (App. A.5.) (579 F.2d *supra* at 778)."

The implied covenant of good faith and fair dealing is not a disputed issue in this case.[1] In issue is the application of this implied covenant and other principles of law to the facts of the case. In this regard, Petitioners' arguments were considered not once, but twice—first by a panel from the Third Circuit and then by the entire Circuit on a petition for reargument *en banc*. Neither the decision of the panel majority nor that of the full Circuit in rejecting the petition was ill-considered.

This case involves the question whether Chevron was required to waive a right of first refusal in a lease between itself and the Petitioners. The Petitioners have argued that, in accordance with the *implied* covenant of good faith and fair dealing, Chevron was obligated to waive the *express* right of first refusal granted to it in the lease because it was inhibiting Petitioners' ability to procure a purchaser for their service station. Petitioners fail to recognize, however, that an implied covenant does not negate the express contract terms agreed to by the parties. As stated in *United States v. Croft-Mullins Electric Co.*, 333 F.2d 772, 776 (5th Cir. 1964) *Cert. Den.* 379 U.S. 968 (1964):

> "It is elementary that one cannot imply a term or promise in a contract which is inconsistent with an express term of the contract itself."

By the express terms of the lease in question, Chevron was required to take no action, either to exercise or waive its right of first refusal, until it was presented with a written, *bona fide* offer to purchase made by a third party. There is no dispute that a written, *bona fide* offer was

1. Moreover, it is difficult to see how a conflict among the Circuits worthy of the attention of this Court results from a decision of the Third Circuit applying New Jersey law and a decision of the Fifth Circuit under Florida law, *Frank H. Coulsen Buick v. General Motors Corp.*, 488 F.2d 202 (5th Cir. 1974), even if those Circuits had both addressed the issue and reached different conclusions.

never submitted to Chevron (Petitioners Brief at P. 4). Thus, Chevron was under no duty to waive its right of first refusal, the implied covenant of good faith and fair dealing notwithstanding.

If Chevron had been required to waive its right of first refusal, it would have lost substantial rights expressly granted by the lease. Such a loss certainly cannot be compelled by the implied covenant of good faith and fair dealing, which has as its basis that neither party shall do anything which will have the effect of causing the other party to give up the benefits it is entitled to under a contract. 5 *Williston on Contracts*, §670 (3d Ed. 1961).

Thus, the decision of the Court below was fully justified and, coupled with the fact that none of the criteria for issuing a Writ of Certiorari have been met, establishes that the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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